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Leonard v. State Appellant's Reply Brief Dckt. 39067

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IN THE SUPREME COURT OF THE STATE OF IDAHO

PHILLIP THOMAS LEONARD JR.,)

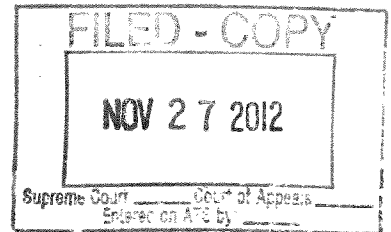
Petitioner-Appellant,)

vs.)

STATE OF IDAHO,)

Respondent.)

S. Ct. No. 39067-2011



REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE BRADLY S. FORD
Presiding Judge

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TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	ii
II.	ARGUMENT IN REPLY	1
III.	CONCLUSION	3

I. TABLE OF AUTHORITIES

FEDERAL CASES

<i>Oregon v. Bradshaw</i> , 462 U.S. 1039 (1983)	3
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STATE CASES

<i>State v. Medrano</i> , 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992)	2
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II. ARGUMENT IN REPLY

BECAUSE THE DISTRICT COURT WOULD HAVE ERRED IN DENYING A MOTION TO SUPPRESS MR. LEONARD'S CONFESSION, MR. LEONARD PROVED HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR HIS ATTORNEY'S FAILURE TO FILE SUCH A MOTION

A detective transported Philip Leonard to the police station so he could submit to a polygraph examination regarding his alleged contact with an underage girl. NPD Report Dated 1-8-2009, p. 3. A second detective advised Mr. Leonard of his rights pursuant to *Miranda* and he “agreed to take the polygraph, but said he did not want to discuss anything after the polygraph.” *Id.* Despite the express limitation on his *Miranda* waiver, the detective asked Mr. Leonard if he wanted to know “how the test went and wanted to know what the test results were and talk about it” and Mr. Leonard said that he did. *Id.* Both detectives confronted Mr. Leonard with the fact that he failed the polygraph, told him that they knew he was not telling the truth and in light of that failure and the other evidence against him, “it was not looking good for his part.” *Id.*

Mr. Leonard then invoked his right to counsel. Although the detectives discontinued questioning, they told Mr. Leonard that it was necessary for his attorney to contact them “immediately.” When Mr. Leonard and the detective arrived at Mr. Leonard’s residence, Mr. Leonard inquired how an attorney could be appointed to assist him since he could not afford one. The detective then misinformed Mr. Leonard that no attorney could be appointed until he was arrested, thus communicating it would be impossible for an attorney to contact the detective immediately as he said was necessary. The detective transported Mr. Leonard back to the police station where he submitted to further interrogation without an attorney present.

These circumstances establish that Mr. Leonard’s confession was taken without a valid

waiver of his previously invoked right to counsel. Thus, had trial counsel filed a motion to suppress, that motion should have been granted and Mr. Leonard's confession could not have been used against him at trial. With this critical evidence suppressed, there is a reasonable probability that but for counsel's failure to file the motion to suppress, the outcome of the case would have been different. Accordingly, Mr. Leonard has proven that he received ineffective assistance of counsel.

According to the state, Mr. Leonard "asserts that he was in custody because he spoke to police while at the police station, received *Miranda* warnings prior to a polygraph examination, and was given rides between the police station and his home by an officer" and that "mere presence at a police station while talking to police is not the equivalent of formal arrest of *Miranda*." Respondent's Brief, p. 6. However, as noted in Mr. Leonard's Opening Brief, those are not the only factors that contributed to Mr. Leonard's custodial status. *See also State v. Medrano*, 123 Idaho 114, 117, 844 P.2d 1364, 1367 (Ct. App. 1992) (fact that accused went to the police station voluntarily and the officer told him that he was not under arrest are not dispositive of the question of *Miranda* custody).

In addition to being transported to the police station and being given *Miranda* warnings, Mr. Leonard submitted to a polygraph, which a reasonable person would find quite intimidating under any circumstances and in Mr. Leonard's case, it was prefaced by highly personal questions. More significantly, after the test, the two detectives disregarded Mr. Leonard's earlier attempt to limit the scope of his waiver and then confronted Mr. Leonard, told him he was lying and that with all the evidence they had, things were not looking good. A reasonable person in these circumstances would believe his freedom was restricted to a degree associated with arrest at the

time Mr. Leonard invoked his right to counsel. *See also* Appellant's Brief, p. 10.

The state further argues that even if Mr. Leonard was in custody when he invoked his right to counsel, he waived that right by requesting to return to the police station and give his statement. However, even if Mr. Leonard reinitiated communications on the ride back to his house, that fact does not necessarily suffice to show a waiver of the previously asserted right to counsel as the inquiries are "separate, and clarity of application is not gained by melding them together." *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983).

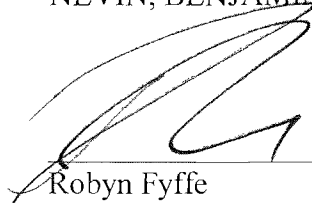
Mr. Leonard explained the reasons that his "request" to return to the police station in order to confess did not constitute a valid waiver of his previously invoked right to counsel at pages eleven to fifteen of his Opening Brief. The state does not offer any meaningful argument in response and thus no reply is warranted.

III. CONCLUSION

For all the reasons set forth above and in Mr. Leonard's Opening Brief, he respectfully asks this Court to reverse the district court's judgment denying his post-conviction claims and to remand this case for further proceedings.

Respectfully submitted this 27 day of November, 2012.

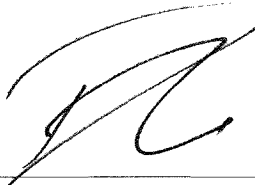
NEVIN, BENJAMIN, McKAY & BARTLETT LLP



Robyn Fyffe
Attorney for Phillip Leonard Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of November, 2012, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.



Robyn Fyffe